

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



# 76-6019

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

FIRST NATIONAL CITY BANK, et al., 76-6029  
THE CHASE MANHATTAN BANK, et al., 76-6019  
MELLON NATIONAL CORPORATION, 76-6026  
CHEMICAL NEW YORK CORPORATION, et al., 76-6035  
MORGAN GUARANTY TRUST COMPANY, et al., 76-6023

Plaintiffs-Appellants.

v.

FEDERAL TRADE COMMISSION, et al.,

Defendants-Appellees.



On Appeal from the United States District  
Court for the Southern District of New York

BRIEF FOR APPELLEES  
FEDERAL TRADE COMMISSION

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BRIEF FOR APPELLEES  
FEDERAL TRADE COMMISSION

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QUESTION PRESENTED

Did the District Court err in dismissing actions seeking preenforcement review of Federal Trade Commission investigative subpoenas where the appellants suffer no hardship in deferring compliance pending the outcome of the judicial enforcement proceedings instituted by the Commission?

## COUNTERSTATEMENT OF THE CASE

### A. Nature of the Actions

Plaintiffs-Appellants, bank holding companies and, in some instances, their bank subsidiaries, brought the instant actions against the Federal Trade Commission and its individual Commissioners (hereafter, the "Commission"), seeking declaratory and injunctive relief with respect to virtually identical Commission subpoenas duces tecum issued to the Chairmen or Presidents of the bank holding companies. Because appellants (collectively referred to as "the banks") sought judicial review on or before the return date set by the Commission for responding to the subpoenas, and prior to the initiation of the enforcement proceedings provided for by the FTC Act, <sup>1/</sup> the actions are "preenforcement"

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<sup>1/</sup> Commission subpoenas are not self-enforcing. Compliance can be compelled only by a Court order issued in an enforcement proceeding pursuant to § 9 of the FTC Act, 15 U.S.C. § 49, which provides in pertinent part:

Sec. 9. \* \* \*

[The] attendance of witnesses, and the production of documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation, issue an order requiring such person, partnership or corporation to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

in nature. The complaints raise issues concerning the authority of the Commission to obtain the information sought in the subpoenas, the relevancy of that information, and the burden in complying with the subpoenas.

#### B. Statement of Facts

In response to congressional action directing a study of the energy industry, <sup>2/</sup> the Commission, by resolutions issued on April 16, 1974, authorized the use of compulsory process in an investigation to obtain information on all pertinent aspects of the structure, conduct and performance of the natural gas, coal and nuclear energy industries (Joint Appendix of Plaintiffs-Appellants at A35-37 (hereafter "App.")). On September 12, 1974, the Commission

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<sup>2/</sup> The Conference Report on the Agriculture, Environmental and Consumer Protection Appropriation Act for 1974, 87 Stat. 468, stated that a portion of the funds appropriated for the FTC were to be used for a study of the energy industry and a report to Congress (H.R. Reg. No. 93-520, 93d Cong. 1st Sess. 24 (1973):

#### Federal Trade Commission

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The conference agreement includes \$1,000,000 for a study of the energy industry. This study shall be in conjunction with the study made heretofore which was limited to the petroleum industry and shall include a report to the Committee and to the Congress at the earliest practicable moment consistent with compiling an adequate study. As in the earlier petroleum study, the study should also include consideration of the effects of decisions by government departments and agencies, including environmental agencies, on the price and supply of energy. The study shall be conducted within the regular organizational structure of the Federal Trade Commission and under normal procedures. \* \* \*

adopted an additional resolution authorizing the use of compulsory process in an investigation to determine the extent and effects of interlocking directorates between petroleum companies and financial institutions (App. A34). <sup>3/</sup>

On June 10, 1975, the Commission issued subpoenas duces tecum, to nine bank holding companies, <sup>4/</sup> including the appellants. <sup>5/</sup> Six of the companies receiving subpoenas, the five appellants and Continental Illinois Corp., filed with the Commission motions to quash or limit the subpoenas. <sup>6/</sup> The motions alleged (1) that the subpoenas were beyond the authority of the Commission to investigate banks; (2) that the subpoenas covered material not relevant to the Commission's investigation of energy companies; and (3) that compliance with the subpoenas would be unreasonably burdensome.

By letters dated August 21, 1975, to the movants, the Commission modified the subpoenas to omit certain

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<sup>3/</sup> The Commission elaborated on this purpose and scope of its investigation in its letters of August 21, 1975, denying in part the banks' motions to quash the subpoenas, stating that since the availability of credit was highly important to the capital-intensive energy sector the staff was investigating the possibility that preferential or discriminatory conduct might result from interlocking relationships (App. A41, A114, A149, A182, A244).

<sup>4/</sup> The subpoenas were also addressed to an officer of each company.

<sup>5/</sup> The other bank holding companies receiving subpoenas were BankAmerica Corp., Continental Illinois Corp., First City Bankcorporation of Texas and Security Pacific Corp.

<sup>6/</sup> BankAmerica Corp., not a party to these actions, filed a motion to quash in November, 1975.

materials and to reduce the burden of compliance, and otherwise denied the motions to quash. (App. A38, A111, A145, A179, A241). The six banks failed to supply the information required by the revised subpoena return date, September 12, 1975, set in the Commission's letters. <sup>7/</sup> Instead, a few days prior to the due date they filed the instant actions in the court below.

C. The Statutory Enforcement Proceedings

On December 19, 1975, prior to the decision of the court below, the Commission instituted enforcement proceedings in the United States District Court for the District of Columbia against six bank holding companies--the five which are parties to these actions and Continental Illinois Corporation. <sup>8/</sup> On March 18, 1976, the Commission instituted an enforcement proceeding against BankAmerica Corp. in the same forum and moved to consolidate the two enforcement proceedings.

On April 12, 1976, the United States District Court for the District of Columbia, per Judge George L. Hart, granted the Commission's motion to consolidate and also granted the motion of certain respondents to transfer the consolidated proceedings to the District Court for

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<sup>7/</sup> BankAmerica Corp. failed to supply the required information by the March 15, 1976, return date set in the Commission's letter of March 2, 1976.

<sup>8/</sup> FTC v. David Rockefeller, et al., Misc. No. 75-0229 (D.D.C., filed Dec. 19, 1975).

the Southern District of New York, pursuant to 28 U.S.C. § 1404(a). The consolidated proceedings are now pending in the court below.

D. Decision of the District Court

Following the precedent of Reisman v. Caplin, 375 U.S. 440 (1964), and Anheuser-Busch, Inc. v. FTC, 359 F.2d 487 (8th Cir. 1966),<sup>9/</sup> the District Court dismissed the banks' complaints, noting that the banks would be able to raise as defenses in the enforcement proceeding instituted by the Commission any claims asserted in these actions (App. A309-A310).

ARGUMENT

Introduction

The banks assert that the district court dismissed the complaints for lack of subject matter jurisdiction, and that the dismissals constituted reversible error. That is not a proper formulation of the issue before this Court. The district court ruled only that "the complaints in these cases should be, and they are, dismissed" (App. A310). As is plain from the court's analysis and its reliance upon Reisman v. Caplin, supra, and Anheuser-Busch Co. v. FTC, supra, neither of which involved questions

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<sup>9/</sup> Despite the banks' repeated characterizations of the grounds for dismissal as being for want of subject matter jurisdiction or for failure to state a claim, the district court's opinion and order did not explicitly endorse either rationale (App. A310).

of subject matter jurisdiction, the district court did not regard itself as lacking "subject matter jurisdiction" in the sense suggested by the banks (Br. 9-11). <sup>10/</sup> Rather, Judge Frankel determined that it would be inappropriate under the circumstances to exercise jurisdiction. The question, then, is whether that determination was wrong as a matter of law or constituted an abuse of discretion. As we shall show, the dismissal was consistent with long-standing authority and was a thoroughly sound exercise of discretion. <sup>11/</sup>

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<sup>10/</sup> The only reference to "subject matter jurisdiction" was in the court's description of the Commission's motion to dismiss (App. A309). As our memorandum in support made plain, however, we argued not solely in terms of subject matter jurisdiction but also in terms of the appropriateness of the exercise of jurisdiction. Rule 12 does not specify a particular format for seeking dismissal on the latter ground, and such contentions may be made by motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6). See, e.g., Schy v. Susquehanna Corp., 419 F.2d 1112, 1115 (7th Cir.), cert. denied, 400 U.S. 826 (1970); Electro Medical Sys., Inc. v. Medical Plastics, Inc., 393 F. Supp. 617, 618 (D. Minn. 1975); Van Horn v. State Farm Mut. Automobile Ins. Co., 283 F. Supp. 260, 261 (E.D. Mich. 1966), aff'd, 391 F.2d 910 (6th Cir. 1968).

<sup>11/</sup> If the Court were to accept the banks' contention that the district court erred in finding no subject matter jurisdiction, it would not be necessary to remand. First, it is plain from Judge Frankel's opinion that he would reach the same result if the question were posed only as to whether it were appropriate to exercise admitted subject matter jurisdiction. Second, under the circumstances, any contrary ruling by the district court would be an abuse of discretion, by reasons we elaborate below (see pp. 23-24, infra). That affirmance without remand would be the proper course even if the district court had, erroneously, dismissed because of a perceived lack of subject matter jurisdiction, is demonstrated by General Motors Corp. v. Volpe, 457 F.2d 922 (3d Cir. 1972).

I. It is Well Established that Challenges to the Validity of Agency Subpoenas May Be Made Only in Enforcement Proceedings

In dismissing the complaints, Judge Frankel held that Reisman v. Caplin, supra, and Anheuser-Busch, Inc. v. FTC, supra, were "controlling precedent" (A309-A310). These cases held that preenforcement actions challenging agency compulsory process should be dismissed in view of the adequate legal remedy available in the form of statutory enforcement proceedings, without which the agency was powerless to obtain compliance with its process.

In Reisman, the plaintiffs sought injunctive and declaratory relief with respect to a summons issued by the Commissioner of the Internal Revenue Service. The Court found that "petitioners have an adequate remedy at law and that the complaint is therefore subject to dismissal for want of equity." 375 U.S. at 443. The Court noted that the sole means available to the Service for enforcing the summons was a provision of the Internal Revenue Code (§ 702) granting the district courts of the United States jurisdiction "by appropriate process to compel such attendance, testimony, or production of books, papers, or other data." In conclusion, the Court stated:

Finding that the remedy specified by Congress works no injustice and suffers no constitutional invalidity, we remit the parties to the comprehensive procedure of the Code, which provides full opportunity for judicial review before any coercive sanctions may be imposed. [375 U.S. at 450.] 12/

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12/ In a 1971 case involving the enforcement of an IRS summons, the Supreme Court reaffirmed the holding in Reisman, stressing the fact that "at the adversary hearing to which the taxpayer is entitled before enforcement is ordered, he may challenge the summons on any appropriate ground." Donaldson v. United States, 400 U.S. 517, 525-27 (1971); cf. United States v. Bisceglia, 420 U.S. 141 (1975).

In Anheuser-Busch, supra, the court of appeals applied the principles of the Reisman decision and reached the same conclusion with respect to Commission subpoenas, upholding dismissal of a preenforcement action in view of the adequacy of the enforcement proceeding under Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, despite claims that the individual and corporation challenging the subpoenas might face prosecution for non-compliance, and that the company would face prejudicial publicity. As then Judge Blackmun wrote for the Court:

We have no hesitancy in concluding and flatly holding, as a matter of law, that Reisman is controlling and that plaintiffs have available to them an adequate remedy at law if and when the Commission seeks judicial assistance to enforce its subpoena. [359 F.2d at 490.]

Accordingly, the court concluded that the complaint, seeking both declaratory and injunctive relief, "was subject to dismissal for want of equity." 359 F.2d at 489. <sup>13/</sup>

Thus, unless this line of authority is no longer good law, <sup>14/</sup> a proposition we address below (see pp. 14-15,

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<sup>13/</sup> The Court of Appeals for the District of Columbia Circuit reached a similar result in FTC v. Millers' Nat'l Fed'n, 47 F.2d 428, 429-30 (D.C. Cir. 1931), wherein it was held that a subpoena was not "subject to investigation by a court of equity or restraint by injunction, as the whole matter can be determined in a proceeding where the Commission invokes the aid of the proper District Court to enforce its order."

<sup>14/</sup> The continued vitality of the Reisman-Anheuser line of authority was recently demonstrated in Atlantic Richfield Co. v. FTC, 398 F. Supp. 1 (S.D. Tex. 1975), appeal docketed, No. 75-2802, 5th Cir., a case involving other subpoenas issued in connection with the Commission's Energy Study. In that case a company sought, inter alia, preenforcement declaratory and injunctive relief with respect to a Commission subpoena to it. In dismissing the company's challenge to the subpoena in advance of an enforcement proceeding, the court stated:

(Continued)

infra), the dismissal of the banks' actions was plainly correct. Accord, SEC v. Boeing Co., CCH Fed. Secs. L. Rep. ¶ 95442 (D.D.C. Feb. 20, 1976). <sup>15/</sup> Under Reisman and Anheuser-Busch the decision below should be affirmed. <sup>16/</sup>

14/ (Continued)

Plaintiff does not appear to have standing to sue in the present posture of the case. Being under no present duty to comply, plaintiff has as yet suffered no legal wrong because of the issuance of the investigative subpoenas. Also, plaintiff has an adequate judicial forum in which to challenge the subject subpoenas on the same grounds proffered in the instant case because of the requirements of 15 U.S.C. § 49. Indeed, adjudication of enforcement at this stage would completely duplicate and preempt the breadth and depth of a proper judicial inquiry conducted pursuant to 15 U.S.C. § 49. \* \* \* [398 F. Supp. at 10.]

15/ Under an analogous line of authority, the courts have held that the validity of the Commission's orders requiring corporations to file reports pursuant to § 6 of the FTC Act, 15 U.S.C. § 46, may ordinarily not be challenged in a preenforcement action, but rather may be challenged only in a statutory enforcement proceeding pursuant to § 9, 15 U.S.C. § 49, at least if the Commission has not issued a notice of default which would trigger the accrual of mandatory penalties pursuant to § 10, 15 U.S.C. § 50. See St. Regis Paper Co. v. United States, 368 U.S. 208 (1961); FTC v. Claire Furnace Co., 274 U.S. 160 (1927); Genuine Parts Co. v. FTC, 445 F.2d 1382 (5th Cir. 1971); General Elec. Co. v. FTC, 1976-1 Trade Cas. ¶ 60823 (N.D.N.Y. March 23, 1976); Aluminum Co. of America v. FTC, 390 F. Supp. 301, 309 n. 27 (S.D.N.Y. 1975). Such penalty provisions, however, do not apply to subpoenas. We discuss below (see pp. 11-12, infra) a recent decision to the contrary.

16/ The banks' suggestion (Br. 28-29) that the Reisman-Anheuser doctrine would not apply to a challenge to the Commission's jurisdiction to issue a subpoena is unfounded. Nothing in the reasoning underlying those cases requires or permits a different result simply because the objection to the subpoena is based upon an asserted statutory limit on the agency's subpoena power rather than, for example, a claim that the subpoena violated constitutional rights (as in Reisman and Anheuser). The banks' reliance (Br. 28-29) upon cases like Leedom v. Kyne, 358 U.S. 184 (1958), is misplaced. That case involved the peculiar provisions of the federal labor laws under which actions of the NLRB concerning representation elections are ordinarily not directly subject to judicial review, and may be considered

(Continued)

II. Neither the Administrative Procedure Act nor the Abbott Labs Trilogy Requires Pre-enforcement Review of the Banks' Challenges to the Commission's Subpoenas

The banks contend that, whatever may be the case under the Reisman-Anheuser line of authority, they have a greater right to preenforcement review under the Administrative Procedure Act ("APA"), as construed by the Supreme Court in the Abbott Labs trilogy,<sup>17/</sup> which the district court erroneously denied to them. In this argument, they rely heavily upon the decisions in A.O. Smith Corp. v. FTC, 396 F. Supp. 1108, 1125 (D. Del. 1975), rev'd in part,<sup>18/</sup> CCH 1976-1 Trade Cas. ¶ 60730 (3d Cir. Feb. 11, 1976). That did not involve a preenforcement challenge to the validity of a subpoena, but rather to Commission orders to file reports,<sup>19/</sup> enforceable by mandatory daily civil penalties,<sup>20/</sup> which, it was alleged, imposed potentially

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<sup>16/</sup> (Continued)

only in the context of an unfair labor practice proceeding. The Court recognized a narrow exception to that principle when the NLRB's action was "contrary to a specific prohibition in the Act" which was "clear and mandatory." Id. at 188. The limitation on the Commission's authority on which the banks rely is not of the same nature. Thus, it is not a total prohibition of investigation of banks (as once it was) but rather turns on case by case determinations of necessity, to be made in the first instance by the Commission. Moreover, it is open to question whether the limitations concerning banks applies also to bank holding companies, to which the subpoenas were directed. The merits of these questions, of course, are not before the Court on this appeal.

<sup>17/</sup> Abbott Labs. v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158 (1967); Gardner v. Toilet Goods Ass'n, Inc., 387 U.S. 167 (1967).

<sup>18/</sup> The decision of the Third Circuit in A.O. Smith, *supra*, is hereinafter cited to the appropriate page in the addendum to the banks' brief.

<sup>19/</sup> See 15 U.S.C. § 46.

<sup>20/</sup> See 15 U.S.C. § 50.

onerous annual reporting requirements that might require revision of future record keeping practices of the plaintiffs. <sup>21/</sup> Before proceeding with a more detailed analysis of the APA, Abbott Labs, and A.O. Smith, we note preliminarily that A.O. Smith itself does not support the banks' premise. Thus, the district court there, in an opinion on which the banks heavily rely, specifically concluded that Abbott Labs "makes it no easier for plaintiffs to maintain suit for pre-enforcement relief" than under Reisman and Anheuser. 396 F. Supp. at 1131.

- A. The APA does not authorize preenforcement judicial review where a statutory enforcement proceeding provides an adequate remedy

The banks' invocation of presumptions of judicial review, and their inability to find any preclusion of

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<sup>21/</sup> We think the courts in A.O. Smith erred in finding that it was appropriate for the district court to exercise preenforcement jurisdiction, since the plaintiffs could not face an actual threat of accrual of civil penalties until the Commission issued notices of default, which it had not done. The Court of Appeals' conclusion that the threat was sufficiently real to warrant preenforcement review presumably reflects its assumption that the plaintiffs would not be able to make the showing of irreparable injury needed to stay the accrual of penalties pendente lite. Nos. 75-1282 to 1289, 3d Cir., Feb. 11, 1976, Br. Add. 26-27. As we note below, even if A.O. Smith were rightly decided it would not support reversal of the district court's dismissal in these cases.

review, are wide of the mark. The issue is not whether the Commission's action <sup>22/</sup> is subject to judicial review but when and in what mode.

The APA provides for judicial review of agency action in a judicial enforcement proceeding or other form of adequate special statutory review proceeding. 5 U.S.C. § 703. The Act further assures a right to judicial review only of agency action "made reviewable by statute and [when it is] final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704, (emphasis supplied). In thus making the right to review conferred by the APA turn on the "adequacy" of any other judicial remedy, the APA established an equitable standard analogous to that governing the right to injunctive or declaratory relief. See, e.g., Abbott Labs. v. Gardner, 387 U.S. 136, 155 (1967); Public Affairs Assocs. v. Rickover, 369 U.S. 111, 112 (1962); General Motors v. Volpe, 457 F.2d 922, 923-24 (3d Cir. 1972).

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22/ Although it is clear that the banks' real attack is on the Commission's issuance of the subpoenas themselves (e.g., Br. 12, 20-28), which are the only Commission actions that impose any potential obligations on them, the banks have made an artful attempt to cast the case as if it involves an effort to seek judicial review of "orders" of the Commission disposing of their motions to quash, and directing compliance with the subpoenas (e.g., Br. 2, 4, 6, 7, 9, 19-20). Quite plainly, however, it is only the subpoenas that can be in issue, and the banks' rights to pre-enforcement judicial review are surely not enhanced by the fact that the Commission has chosen, in its discretion, to provide an administrative remedy concerning objections to subpoenas. Since the Commission's actions on a motion to quash a subpoena are subject to no specific standards imposed by statute or rule, its action on such motions may fairly be said to be committed to agency discretion.

Thus, cases such as Reisman and Anheuser-Busch are wholly consistent with the APA, based as they are on the adequacy of the statutory enforcement proceeding, and the district court's dismissal was not contrary to the terms of the APA.

- B. Abbott Labs did not oblige the district court to exercise preenforcement judicial review of the banks' objections to the subpoenas

The banks rely less upon the APA itself than the interpretation the Court gave it in the particular circumstances of Abbott Labs. v. Gardner, 387 U.S. 136 (1967), <sup>23/</sup> one of the oft-cited trilogy of cases involving preenforcement review of formal regulations of the Food & Drug Administration. The banks apparently contend that Abbott overruled cases like Reisman and Anheuser-Busch. However, in his opinions for the Court, Justice Harlan (a member of the majority that decided Reisman only a few years earlier) made no reference to that case or to others concerning

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<sup>23/</sup> The case of Exxon Corp. v. FTC, Trade Reg. Rep. 1976-1 Trade Cas. ¶ 60,748 (D. Del. 1976), on which the banks rely (Br. at 9, 10) is not in point. That case did not deal with a subpoena but with an unprecedented document preservation order. The court assumed jurisdiction because it found that later review in a proceeding to enforce a subpoena for the documents or in review of a cease and desist order would not be an adequate remedy to test the Commission's authority to issue the order itself. 1976-1 Trade Cas. ¶ 60,748 at 68,212. Here, however, there is no question but that the banks can raise all their objections to the validity of the subpoena in the proceeding to enforce the subpoena.

challenges to agency compulsory process. <sup>24/</sup> There is no reason to think that the Court intended to effect sub silentio some change in the established law governing such actions. Upon analysis of Abbott Labs and this case it is clear that Judge Frankel properly concluded that Abbott Labs does not "cast the slightest doubt upon the continued validity for our purposes of Reisman v. Caplin, supra." (App. A309). In Abbott the Court was confronted with dramatically different circumstances than are at issue here. There, an entire industry joined in challenging regulations which would have required changing existing stocks of labels at substantial expense to all of the companies. The risks of non-compliance included seizure of the entire stock of mislabeled goods and an injunction against their distribution. Moreover, there were criminal sanctions that applied regardless of the good faith or intent of a party who wished to obtain judicial review. Finally, the plaintiffs were in a sensitive industry and the public confidence so important to them could have been impaired if to obtain judicial review, they had to submit to seizure or other proceedings in which their goods were said to be "misbranded."

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<sup>24/</sup> Justice Harlan had also been a member of the majority in St. Regis Paper Co. v. United States, supra, which had reaffirmed the holding in Claire Furnace that pre-enforcement review of Commission orders to file reports was not available if the Commission had not issued a notice of default. See p. 10 n. , supra. Abbott did not mention St. Regis or Claire Furnace.

In an effort to bring this case within the holding of Abbott, the banks recognize their burden to demonstrate that such substantial risks attach to noncompliance with the subpoenas that they would have a severe hardship if required to secure judicial review of their claims in a proceeding instituted by the Commission to enforce the subpoenas. (Br. 11). The banks assert that such hardship was at hand because of (1) the theoretical risk of criminal penalties for noncompliance (Br. 22-26); (2) the injury to their reputations which would result if the banks were required to await an enforcement proceeding (Br. 26); and (3) the summary nature of the enforcement proceeding compared with a plenary civil action (Br. 26-27). None of these arguments withstands careful scrutiny.

#### 1. Criminal penalties

Significantly, two of the five banks did not even mention the risk of criminal penalties in their initial complaints, <sup>25/</sup> an indication that any possible risk of criminal liability was not a major factor behind their decision to seek pre-enforcement review. And, counsel for a third bank acknowledged that criminal prosecution was "the remotest possibility imaginable" (App. A300). Nonetheless, both in the court below and again before this Court, the banks argue that the risk of criminal penalties

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<sup>25/</sup> Complaint of Chemical New York Corporation (App. A157); complaint of Morgan Guaranty Trust Co. (App. A191).

under Section 10 of the FTC Act (15 U.S.C. § 50) is a hardship warranting preenforcement review at the instance of the banks.

Although Section 10 elsewhere distinguishes among "persons" and "corporations," the criminal provision applicable to a refusal to answer or produce documentary evidence in obedience to the Commission's subpoena or order applies only to a "person." This distinction prompted the Supreme Court to conclude in St. Regis Paper Co. v. United States, 368 U.S. 208, 221 (1961), that only an individual could be prosecuted under Section 10. <sup>26/</sup>

Judge Frankel properly dismissed the risk of prosecution because all the appellants here are corporations (App. A309), and they are not entitled to invoke the theoretical risk of prosecution of the officers named in the subpoenas.

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<sup>26/</sup> Consistent with this interpretation are the recent amendments to the FTC Act, which inserted the words "person, partnership or corporation" in numerous key sections of the Act, including Section 10. While such amendments were made at selected places in the second and third paragraphs of Section 10, the crucial reference to "person" in the first line of the first paragraph (the penal provision in question here) was not changed, thereby leaving only individuals subject to its coverage. Section 203 of Pub. L. 93-637, 88 Stat. 2183, 2198-2199 (1975). Congress' amendment and reenactment of Section 10 after the narrow interpretation placed on the criminal portion of the section by the Supreme Court in St. Regis effectively precludes a broader reading of it, particularly in view of the "rule of lenity" calling for narrow construction of ambiguous criminal statutes. See, e.g., United States v. Bass, 404 U.S. 336, 347 (1971).

In any event, as the Eighth Circuit held in Anheuser-Busch (involving an individual's preenforcement challenge to a subpoena), the banks apparently concede "that good faith non-compliance with an FTC subpoena precludes the imposition of the criminal penalties provided by § 10 of the FTC Act" (Br. 23). <sup>27/</sup> "Good faith" is measured for such purposes more by the substantiality of the objections to the subpoenas <sup>28/</sup> than by the frequency or persistence of their assertion. <sup>29/</sup> Judge Frankel properly found

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<sup>27/</sup> In Abbott Labs, the Supreme Court refused to accept the government's assertions that "the threat of criminal sanctions for noncompliance with a judicially untested regulation is unrealistic \* \* \*" (387 U.S. at 154) but the government's position in Abbott was not based on established legal precedent that good faith noncompliance would not be subject to criminal sanctions, as is the case here, but only on a unilateral policy declaration made by the Department of Justice after the action had been brought. Id. And, unlike the criminal provision in § 10 of the FTC Act, the relevant provisions of the Food Drug and Cosmetic Act (21 U.S.C. §§ 331-334) provide for strict liability for individuals and corporations regardless of intent. United States v. Park, 421 U.S. 658 (1975).

<sup>28/</sup> While we do not think the banks' objections meritorious, we do not suggest that they are so frivolous as to betoken bad faith. The banks' claim that St. Regis "implied that criminal penalties may be imposed where non-compliance with FTC demands is justified only in part" (Br. 24) is unfounded. In St. Regis the Court sustained civil penalties based on a company's total refusal to comply with orders to file special reports, some portions of which were held invalid. The Supreme Court endorsed this Court's observation that the case did not involve "an honest mistake in a good faith attempt to comply \* \* \*." 368 U.S. at 224. The Court also distinguished the situation in St. Regis from prosecution for failure to comply with a partially invalid subpoena. Id. See Boerman Dairy Co. v. United States, 341 U.S. 214, 221 (1951).

<sup>29/</sup> The banks' assertion that they had no option to test the validity of their objections to the subpoenas but to engage in "wilful default" (Br. 22, 24), uses "wilful" simply to indicate a knowing or intentional default on legal grounds. To our knowledge, in 60 years no one has ever been prosecuted under § 10 for such a refusal to comply with a subpoena. The "wilful" defaults subject to prosecution are only those that are without substantial legal foundation and are contemptuous of the Commission's authority.

unpersuasive the assertion by some of the plaintiffs that the mere bringing of a pre-enforcement action somehow demonstrates plaintiffs' "good faith" in refusing to comply with the subpoenas, and thereby protects them from potential criminal penalties under section 10 of the FTC Act. [App. A309-A310.]

In support of their argument (Br. 23), the banks cite the district court's decision in A.O. Smith Corp. v. FTC, supra, 396 F. Supp. at 1130. But while the district court in A.O. Smith erroneously assumed that corporations could be prosecuted under Section 10, and relied on the combined risk of civil and criminal penalties in finding "hardship," the court of appeals declined to rely on the risk of criminal penalties, and rested solely on the risk of civil fines which are not attendant here. Br. Add. 19-20. <sup>30/</sup>

## 2. Injury to reputation

Although they made no such allegations in their complaints, the banks now make the unsupported assertion that their reputations would be injured if they "had to await the pleasure of the FTC to commence an enforcement proceeding to challenge these Subpoenas" (Br. 26). This argument is totally without merit.

Insofar as the banks claim injury from the commencement of an enforcement proceeding, it is an injury that has occurred and could have occurred regardless of whether

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<sup>30/</sup> The banks are not subject to the risk of civil fines potentially faced by the plaintiffs in A.O. Smith since the civil sanction provision referred to there (15 U.S.C. § 50) applies only to failure to comply with a Commission order to file an annual or special report, not to a subpoena issued under Section 9 of the FTC Act.

they are entitled to seek preenforcement review. In any event, they made no effort to forestall such proceedings. As for the mere waiting for such proceedings to be commenced, it is difficult to conceive of any cognizable injury. Indeed, the banks' claim of injury leads to the ridiculous conclusion that they would be most grievously injured if the Commission acquiesced in their noncompliance with the subpoenas and deferred enforcement indefinitely.

On either reading the banks' claim of injury is understandably without support and should be disregarded. The banks cite language from Abbott Labs, where the Supreme Court noted that because of the sensitive nature of the drug industry, the drug companies might be harmed "severely and unnecessarily" if they were forced to challenge the regulations only as a defense in a seizure, injunction or criminal action brought by the Government, 387 U.S. at 153 n. 19. But, as set forth supra, the circumstances in the instant case are vastly different than those addressed by the Court in Abbott.

### 3. Summary nature of enforcement proceedings

The banks further suggest that the enforcement proceeding is an inadequate alternative to the instant preenforcement actions because such enforcement proceedings are summary in nature (Br. 26-27). But the banks' sole support for this contention is the district court's decisions in A.O. Smith Corp. v. FTC, supra, 396 F. Supp. at 1117, 1134,

where the court cited the summary nature of the proceedings as a basis for its finding of irreparable injury warranting issuance of a preliminary injunction (enjoining initiation of enforcement proceedings). But the banks fail to note that this portion of the district court's holding notably was unrelated to the question whether preenforcement review was appropriate, and was reversed by the Third Circuit on appeal. <sup>31/</sup>

In any event, as Judge Frankel noted below <sup>32/</sup> a party subject to a subpoena ought not to be allowed to evade such

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<sup>31/</sup> Thus, with respect to this issue, the Third Circuit wrote:

We may begin by conceding that the scope of discovery in a summary enforcement proceeding might be different from that in a plenary suit, just as it might be different if the suit were heard in district A instead of district B, or before judge X instead of judge Y. However, we could hardly elevate such a speculative and fortuitous procedural variance to the status of irreparable harm without seriously--perhaps irreparably--undermining the salutary limitation that concept places on the exercise of the injunctive power. [Br. Add. 25.]

The Third Circuit went on to note that, even in an enforcement proceeding, a court has some discretion to permit limited discovery. Id.

<sup>32/</sup> The significance of the summary nature of enforcement proceedings was also raised in oral argument in the court below, as indicated in the following colloquy between one of the attorneys for the banks and Judge Frankel:

MR. GOLDSTONE: \* \* \*

We think discovery in this case is vital and we think that plenary jurisdiction of the court is of vital requisite to litigate.

THE COURT: Why is that? If you need discovery to show the want of jurisdiction and if the want of jurisdiction is an open question, what disables the District Court on the enforcement proceeding from giving you discovery?

(Continued)

discovery limitations as may exist in the statutory enforcement proceeding <sup>33/</sup> simply by filing a preenforcement action prior to initiation of the statutory proceeding. Moreover,

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32/ (Continued)

I don't understand that at all. Will you take that position in the enforcement court if I send you away from here?

MR. GOLDSTONE: That we need discovery?

THE COURT: That you can't have discovery there because it is an enforcement proceeding.

MR. GOLDSTONE: None [sic], we won't take that position, your Honor, but we face the risk that we won't get discovery.

THE COURT: I know you face the risk. Life is filled with risks, but are you entitled to it there or are you not? What is your position on this record?

MR. GOLDSTONE: We will take the position that we are entitled to it.

THE COURT: All right. If that is your position there, I think that you ought to stick to it, and if you are not entitled to it there, then it seems to me your effort to make an end run around the prescribed enforcement proceeding should probably fail on that ground in addition to the others that seem persuasive to me.  
[App. A294-295]

33/ Congress has established the summary enforcement proceeding for valid reasons which should not be ignored. In United States v. Associated Merchandising Corp., 256 F. Supp. 318, 321 (S.D.N.Y. 1966), involving a similar enforcement procedure for Commission orders, the court noted:

By Section 49, Congress has expressly conferred jurisdiction to issue a writ of mandamus. Therefore, it seems clear that Congress has expressly authorized the court to proceed summarily to enforce orders of the Federal Trade Commission for the production of documents.

Such a construction of the statute comports with its manifest purpose, to secure the aid of a court in requiring prompt compliance, in a proper case, with an administrative order. To compel the government to proceed by plenary suit would inevitably involve substantial delay.

the banks' attempt to rely upon speculative differences in the availability of unidentified discovery--which they claimed below they would be entitled to in an enforcement proceeding (see p. 21 n. 32, supra)--is contrary to their primary assertion that their preenforcement complaints raise "a purely legal question" (Br. 12) as to which discovery should be unnecessary. There is, in short, no basis for the banks' contention that the summary nature of the enforcement proceedings constitutes a hardship warranting preenforcement judicial review.

\* \* \*

In the final analysis, whatever might be the appropriate disposition of a preenforcement action brought by companies against whom no enforcement proceeding had been begun (as was the case in Abbott and A.O. Smith <sup>34/</sup>), the situation is markedly different when, as here, the banks are parties to an ongoing enforcement proceeding. Neither Abbott nor A.O. Smith compels a district court to exercise its jurisdiction in those circumstances.

Thus, A.O. Smith merely held that the district court had not abused its discretion in exercising jurisdiction when no enforcement proceedings had effectively been instituted against the plaintiffs, and did not hold that it would have been an abuse of discretion to decline to

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<sup>34/</sup> The court of appeals emphasized in A.O. Smith that "the Commission had not moved effectively for enforcement" against any of plaintiffs there. Br. Add. 11-12.

exercise jurisdiction. Similarly, Abbott held only that the court of appeals had erred in reversing a district court's refusal to dismiss a preenforcement action. Addressing the situation (not before it) where there were multiple actions pending, the Court noted that, among other discretionary remedies, "[a] district court may even in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere." 387 U.S. at 155. In following the Court's advice here, and in dismissing the banks' preenforcement suits in favor of the Commission's enforcement proceeding against all in default with respect to essentially the same subpoenas, Judge Frankel did not abuse his discretion. <sup>35/</sup>

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<sup>35/</sup> In any event, since the enforcement proceeding has been transferred at the banks' request to the forum of their choice, it is difficult to see how they could be prejudiced by having to litigate their claims in that proceeding.

III. Preenforcement Review of Agency Subpoenas  
Would Disrupt and Delay Investigations by  
Government Agencies Being Conducted in the  
Public Interest

The Federal Trade Commission has substantial law-enforcement responsibilities, as well as duties to keep the Congress and the public informed of practices "in or affecting commerce" which could adversely affect the economy of our competitive system. The Commission's broad powers of investigation are undisputed. United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950); United States v. St. Regis Paper Co., 285 F.2d 607, 611-13 (2d Cir. 1960), aff'd, 368 U.S. 208 (1961).

Preenforcement challenges to subpoenas can hamper an agency in effectively carrying out its investigative duties. Courts have evidenced an understandable reluctance to interfere with an investigation during its early stages. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 213-14 (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943); SEC v. Brigadoon Scotch Dist. Co., 480 F.2d 1047, 1056 (2d Cir. 1973); FTC v. Millers' Nat'l Fed'n, 47 F.2d 428 (D.C. Cir. 1931).

If preenforcement relief were permitted under the instant circumstances, recipients of Commission subpoenas could hamper the Commission's investigations by bringing anticipatory suits for injunctive relief in forums of their choosing and on

possibly short notice.<sup>36/</sup> Section 9 of the Federal Trade Commission Act, however, provides that subpoena enforcement actions are to be brought in a specific forum, namely, a district court located within the jurisdiction in which the Commission's inquiry is carried on. The grant of jurisdiction to a specific forum is especially important where, as here, the recipients of essentially similar subpoenas reside in different jurisdictions, since it allows the Commission to initiate enforcement proceedings against all defaulting parties in a single court. See FTC v. Browning, 435 F.2d 96, 100 (D.C. Cir. 1970). This has in fact been accomplished with respect to the instant cases. The Commission has now instituted consolidated enforcement proceedings which include not only the holding companies that are parties in the instant actions, but also two additional bank holding companies subject to virtually identical subpoenas.<sup>37/</sup>

In short, preenforcement review in such cases has a detrimental potential to disrupt unnecessarily and prematurely

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<sup>36/</sup> In the case of orders issued by the Commission pursuant to § 6 of the FTC Act, 15 U.S.C. § 46, requiring approximately 40 companies to file reports concerning the electrical engineering manufacturing industry, the Commission was sued by four companies in preenforcement actions brought in three different districts. Westinghouse Electric Corp. v. FTC, No. C-1-75-418 (W.D. Ohio, April 15, 1976); General Electric Co. v. FTC, 1976-1 Trade Cas. ¶ 60823 (N.D.N.Y. March 23, 1976); Emerson Electric Co. v. FTC 75-1173C(1) (E.D. Mo.). While the Commission's efforts to consolidate all of this litigation in the District of Columbia where enforcement proceedings have been commenced may ultimately be successful, this cannot be accomplished without considerable expense and effort costly to the Commission and the courts. And such efforts inevitably result in substantial delay in reaching the merits.

<sup>37/</sup> See page 5, supra.

the flow of agency investigations and circumvent the statutorily prescribed procedure for reviewing the enforceability of subpoenas. As the district court stated in General Electric Co. v. FTC, supra, 1976-1 Trade Cas. at 68,597, with respect to its decision to transfer preenforcement actions (concerning Commission orders to file reports) to the forum in which consolidated enforcement proceedings had later been instituted:

[I]n light of the timely enforcement proceeding commenced by the FTC and their forbearance from seeking statutory penalties, it is my firm judgment, that preserving the integrity and efficiency of the judicial review procedure mandated by Congress in the Federal Trade Commission Act is of equal importance in supporting an order to transfer. Federal Trade Commission v. Claire Furnace Company, 274 U.S. 160, 173-74 (1927); cf. Weinberger v. Salfi, 422 U.S. 749 (1975); Dunlop v. Bachowski, 421 U.S. 560, 566-568 (1975). The Federal Trade Commission, or any regulatory agency for that matter, could not conduct its statutory responsibilities efficiently if it were forced to litigate its orders again and again throughout the nation by full plenary proceedings with numerous appeals to follow. Such circumstances are particularly inappropriate when the FTC itself has sought enforcement of its orders by the statutory section 9 enforcement action which has fewer procedural and pretrial tangles and which was specifically created by Congress for such purposes. See Hannah v. Larche, 363 U.S. 420, 446-448 (1960). 38/

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38/ The primacy of enforcement proceedings was also indicated in Ford Motor Co. v. Coleman, 402 F. Supp. 475, 486 (D.D.C. 1975) (three-judge court), aff'd, 44 U.S.L.W. 3586 (U.S. April 19, 1976).

CONCLUSION

For all of the foregoing reasons, the Commission respectfully submits that this Court should affirm the decision of the district court dismissing the instant preenforcement actions.

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APRIL 1976

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

FIRST NATIONAL CITY BANK, et al.,	)	No. 76-6029
THE CHASE MANHATTAN BANK, et al.,	)	No. 76-6019
MELLON NATIONAL CORPORATION,	)	No. 76-6026
CHEMICAL NEW YORK CORPORATION, et al.,	)	No. 76-6035
MORGAN GUARANTY TRUST COMPANY, et al.,	)	No. 76-6023
Plaintiffs-Appellants,	)	
v.	)	
FEDERAL TRADE COMMISSION, et al.,	)	
Defendants-Appellees.	)	

CERTIFICATE OF SERVICE

I hereby certify that I served the Defendants-Appellees' brief in the above-captioned cases, by placing a true and correct copy thereof, in the U.S. Mail, first class, postage prepaid, addressed to:

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